No. 87-21

In the Supreme Court of the United States

OCTOBER TERM, 1986

DUANE L. MORGAN, DANIEL W. BOTTORFF, CARL L. GROOM, RICHARD W. HOEGH, DAVID L. BLOSS, ALBERT L. GRABLE, KENNETH P. HENDERSON, and PAUL A. NEWTON,
Petitioners,

vs.

ST. JOSEPH TERMINAL RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND THE BROTHERHOOD OF RAILWAY & AIRLINE CLERKS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a Writ of Certiorari should be issued regarding the following questions:

1. Whether the Eighth Circuit correctly held that Petitioners' claims for *New York Dock* labor protection conditions, which Petitioners interpret to guarantee them pay even if they do not work, are within the primary jurisdiction of the Interstate Commerce Commission (ICC) because Congress delegated to the ICC the authority to impose, apply and interpret labor protection conditions in accordance with the national rail transportation policy established in the Interstate Commerce Act.

2. Whether the Eighth Circuit correctly held that Petitioners failed to present a genuine issue of material fact on their claim that BRAC breached its duty of fair representation.

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The opinions below, the basis of this Court's jurisdiction and certain statutory provisions involved are set out at pages 2-3 of the Petition for a Writ of Certiorari ("Pet.")

and at pages 1a-28a of the Appendices to the Petition ("Pet. App."). The Eighth Circuit's opinion is reported at 815 F.2d 1232 (1987). Additional relevant statutory provisions are set forth in Appendix A to this brief.

I. STATEMENT OF THE CASE

This action was brought by several former employees of the St. Joseph Terminal Railroad Company ("SJTR") against their former employer, its joint owners, Union Pacific Railroad Company ("UPRR") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), and against the plaintiffs' union, the Brotherhood of Railway, Airline and Steamship Clerks & Freight Handlers, Express and Station Employees ("BRAC").

In 1980 UPRR's parent filed an application with the Interstate Commerce Commission ("ICC") to acquire control over certain other entities ("merger"), including the parent of the Missouri Pacific Railroad Company ("MP"). As part of the proceedings on the application, the ICC considered the nature of the labor protective conditions which would be imposed under 49 U.S.C. §11347 if the application were granted.

BRAC appeared at the extensive hearings regarding the merger application. As the ICC proceedings progressed, BRAC kept all SJTR employees, including Petitioners, fully informed of the course of the proceedings, sought information from them and provided each SJTR employee with a copy of the *New York Dock* labor protective conditions which the ICC was likely to impose if the application were granted. *New York Dock Ry. - Control - Brooklyn Eastern District*, 360 ICC 60, *affirmed sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) (*"NYD"*).

Petitioners' sole claim throughout this litigation has been that an employee covered by *NYD* is entitled to pay for six years even though he does not work and even if the carrier provides the employee with work at another location which requires the employee to relocate at the carrier's expense. (Pet. 5) In fact, *NYD* provides for a monthly wage continuation for up to 6 years only if the employee is a "dismissed" employee. (*NYD*, Art. I, Section 6) *NYD* defines a dismissed employee as one "who as a result of a transaction is deprived of employment with the railroad. . . ." (*NYD*, Art. I, Section 1[c]) In the ICC proceedings regarding UPRR, BRAC and other unions argued to the ICC that employees should be entitled to draw protective pay as "dismissed" employees if their jobs were eliminated due to the transaction even if the employees refused continuous employment in railroad jobs elsewhere which are offered to them. The ICC rejected the unions' argument, as the ICC had rejected the same argument in many prior proceedings involving merger applications by other carriers. *Union Pacific Corp. Pacific Rail System, Inc. and Union Pacific RR - Control - Missouri Pacific Corp. and Missouri Pacific Railroad*, 366 ICC 459 (1982), *aff'd in part and rev'd in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. den. sub nom. Kansas City Southern Ry. Co. v. U.S.*, 469 U.S. 1208.

Ultimately, the ICC approved the merger application and in its order imposed the New York Dock Conditions (*NYD*) for labor protection. *NYD* provides for mandatory arbitration of disputes concerning who is eligible for *NYD* and concerning the application and interpretation of the *NYD* conditions in any particular situation (*NYD* Section 11 arbitration). The ICC's order was affirmed in relevant part in *Southern Pacific Transportation Co. v. ICC*, 736

F.2d 708 (D.C. Cir. 1984), *cert. denied sub nom. Kansas City Southern Ry. Co. v. U.S.*, 469 U.S. 1208 (1985).

For several years, the SJTR's business had steadily decreased. The decline in business and the introduction and refinement of a computer system had reduced the amount of clerical work and, accordingly, the number of SJTR employees in the BRAC bargaining unit. The labor contract between BRAC and SJTR provided that SJTR could reduce forces without payment of any contractual labor protection benefits if there was a decline in SJTR's business or if SJTR's owners chose to transfer their work from SJTR to another location.

Because of the declining business of SJTR, Santa Fe, which was not subject to the ICC's order, including the *NYD* conditions, and UPRR decided to dissolve the SJTR which would eliminate the SJTR clerical positions. The SJTR representatives notified BRAC and met with BRAC to discuss the cessation of SJTR operations. Prior to the negotiations each side considered what would be the best and worst outcome for it, as would be done in any negotiations. Each side was represented in negotiations by a veteran negotiator with considerable *NYD* experience. Petitioners' local lodge representative attended all meetings and reported the events to the SJTR employees. One meeting to consider a draft agreement between the parties was held with all of SJTR's BRAC represented employees; all had previously been provided with a copy of *NYD* and were also provided with a copy of the draft agreement.

In the negotiations, BRAC argued that the dissolution of the SJTR was related to the merger of UPRR and MP and that, therefore, the employees were entitled to *NYD* benefits. SJTR, relying upon ICC and arbitral author-

ities, denied that benefits were due under *NYD*. Moreover, SJTR emphasized that under *NYD* the employees would not be able to draw protective pay for not working if they rejected the opportunity to relocate at the carrier's expense and continue working.

BRAC's representative knew that ICC and arbitral authority would not permit employees to be paid for not working if they refused to relocate to work in available jobs. BRAC's representative knew that the ICC had rejected the unions' demand for that very benefit. BRAC's representative knew that the employees would not be entitled to any contractual or *NYD* benefits if the railroads established that the SJTR's cessation of operations was not a result of the merger but was merely a relocation of the owners' work. Finally, BRAC's representative knew that, under the BRAC constitution, all SJTR employees would not be able to dovetail their seniority for job bidding purposes onto other seniority rosters because they had not identified enough SJTR work which would be transferred to UPRR upon SJTR's closing to justify dovetailing SJTR employees on the UPRR seniority rosters.

The District Court correctly summarized the situation facing BRAC during the negotiations:

> The union was therefore faced with a choice. It could push for implementation of *New York Dock* and, if successful, argue that under Article III plaintiffs were entitled to refuse to move and still collect six years' pay as termination benefits. If unsuccessful at either stage, those Terminal employees not wishing to move would be left with nothing. Alternatively, the union had the option to attempt to negotiate different conditions whereby those employees desiring

to remain in St. Joseph could obtain prompt and certain benefits.

Pet. 18a.

SJTR's owners wanted to cease SJTR operations as soon as possible. A prompt closing was necessary to meet their business objectives. In order to avoid a protracted dispute, SJTR made a substantial proposal to BRAC for an agreement to immediately resolve the issue. SJTR's proposal provided benefits in excess of *NYD* benefits for the employees, including a job offer at the same pay and benefits, continuation of contractual protection pay where applicable, housing and moving allowances, and protection against losses due to home sales. While the parties at first considered providing some, but not all, SJTR employees with full job bidding seniority in addition to fringe benefit seniority, no justification for the job bidding seniority was established because no jobs would be created elsewere as a result of the SJTR closing.[1] Although requested to do so, Petitioners never provided BRAC with information that substantial SJTR work would have to be performed at other points. Moreover, another BRAC local insisted that the BRAC constitution be followed which would preclude dovetailing seniority at another point where no work was transferred to that point. Disagreement was expressed even among the members of SJTR's BRAC unit regarding the appropriate resolution of the seniority issue.

Shortly after a private meeting between BRAC and the SJTR employees at which the various proposals and issues were discussed, the parties reached agreement pro-

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1. Under *NYD*, seniority is to be determined according to applicable labor contracts, unless otherwise negotiated by the parties. (*NYD*, Art. I, §1)

viding benefits in excess of *NYD* benefits to the SJTR employees. These negotiated benefits included the option of accepting jobs with UPRR in Omaha or accepting lump sum separation payments of approximately $35,000 per employee. Under *NYD* this option would not have been available; an employee rejecting a job would not receive a separation allowance.

While some SJTR employees represented by BRAC accepted jobs with UPRR, Petitioners elected to resign and take the lump sum payment; each Petitioner signed a release of all claims to other benefits. No new clerical jobs were created anywhere as a result of SJTR's closing.

In November 1984, Petitioners instituted this action seeking "*NYD* benefits." During the course of discovery, BRAC contended that it learned of facts previously unknown to it regarding the closing of the SJTR and demanded arbitration pursuant to *NYD*. An arbitration occurred. Petitioners and their counsel refused to participate in the arbitration although repeatedly invited. In an award dated February 4, 1986, the arbitrator concluded that the cessation of SJTR operations was related to the merger but that, through the negotiated agreement, the SJTR clerical employees, including Petitioners, had received all benefits to which they could have been entitled under *NYD*. Regarding the dovetailing of seniority question, the arbitrator held:

> [T]here is no authority under New York Dock to allow an affected employee to exercise seniority over an existing employee for a *de minimis* portion of that employee's work.

Regarding the question under *NYD* as to whether Petitioners would be paid for not working after they had refused job offers, the arbitrator held:

> In the facts of this case, the employees who elected severance would have been compelled to either accept the Omaha positions offered by the UP with all the aforementioned provisions accompanying the acceptance of such positions or would have forfeited their rights to any protective benefits.

Petitioners did not seek review of the arbitrator's award.

The District Court granted Respondents' motions for summary judgment on the claim that BRAC violated its duty of fair representation and dismissed Petitioners' claim for *NYD* benefits because it was within the ICC's primary jurisdiction. (Pet. App. 7a-28a) The Eighth Circuit Court of Appeals affirmed. (Pet. App. 1a-6a)

II. SUMMARY OF ARGUMENT

There are no grounds upon which a Writ of Certiorari should be issued to review the Eighth Circuit's decision.

The Eighth Circuit correctly held that labor protection claims are within the ICC's primary jurisdiction. There is no conflicting authority by the circuit courts of appeal or by this Court. *Englehardt v. Consolidated Rail Corporation,* 756 F.2d 1368, 1369 (2nd Cir. 1985); *Hoffman v. Missouri Pacific Railroad Company,* 806 F.2d 800, 801 (8th Cir. 1986); *Walsh v. United States,* 723 F.2d 570, 572, 575 (7th Cir. 1983). Petitioners' reliance on this Court's decision in *Norfolk and Western Railway Company v. Nemitz,* 404 U.S. 37 (1971), *reh. den.,* 404 U.S. 1026 (1972), is misplaced because this Court did not address the issue of primary jurisdiction over *NYD* claims in *Nemitz.* Petitioners' reliance on the Sixth Circuit's decision in *Nemitz v. Norfolk and Western Railway Company,* 436 F.2d 841 (1971), is misplaced because the Sixth Circuit has

held that its *Nemitz* decision does not control *NYD* claims such as those presented in this case and has held that *NYD* claims should be resolved according to the ICC's order requiring arbitration, which is entirely consistent with the Eighth Circuit's decision in this case. *Atkins v. Louisville and Nashville Railroad Company,* 819 F.2d 644 (6th Cir. 1987). Moreover, Petitioners cite no authority for their argument that the courts below, rather than the ICC, have jurisdiction to impose labor protection conditions as a result of an alleged abandonment of a railroad line. Abandonment issues are within the exclusive authority of the ICC. *Chicago & Northwestern Transportation Company v. Kalo Brick & Tile Company,* 450 U.S. 311 (1981). The imposition of labor protection conditions is within the exclusive jurisdiction of the ICC. 49 U.S.C. §11347.

The Eighth Circuit applied the correct legal standard to Petitioners' duty of fair representation claim, as Petitioners concede. (Pet. 16) Petitioners' mere disagreement regarding the interpretation of facts is not grounds to issue a Writ of Certiorari. Sup. Ct. R. 17. In any event, the Eighth Circuit's decision is fully in accord with this Court's decisions in *Humphrey v. Moore,* 375 U.S. 335, *reh. den.,* 376 U.S. 937 (1964) and *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953).

III. REASONS FOR DENYING THE WRIT

A.

There Is No Authority Conflicting With the Eighth Circuit's Correct Holding That Petitioners' Claim for Benefits Under the ICC's Order Is Within the Scope of the ICC's Primary Jurisdiction

Plaintiffs argue that the Eighth Circuit incorrectly applied the doctrine of primary jurisdiction to their claims that under *NYD* they were entitled to be treated as "dismissed" employees, notwithstanding the jobs offered to them. In the Interstate Commerce Act ("Act"), Congress established a national rail transportation policy and established the ICC to administer that policy. 49 U.S.C. §10101a and §10301. Under the Act, the ICC has exclusive authority to regulate railroad combinations. 49 U.S.C. §11341. The ICC also has exclusive authority to consider the interests of employees and to impose "fair arrangements" for their protection in connection with railroad combinations. 49 U.S.C. §11347. In *NYD* protective conditions, as in all of its protective conditions, the ICC has established arbitration as the procedure to determine whether any person is eligible for benefits and as the procedure to resolve any dispute regarding the interpretation or application of *NYD*.

The courts of appeal which have considered the issue have unanimously held that, because of the Congressional policies underlying labor protection and the ICC's exclusive role in defining and administering labor protection, claims regarding ICC labor protection benefits are within the ICC's primary jurisdiction. Faced with a claim by railroad employees that a negotiated agreement between their railroad employer and their union violated ICC labor

protection conditions, the Second Circuit affirmed the district court's dismissal of the claim on the grounds of the ICC's primary jurisdiction, observing as follows:

> The ICC-related claims against the railroad were dismissed pursuant to the doctrine of "primary jurisdiction." Where the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues "beyond the conventional experience of judges," *Far East Conference v. United States,* 342 U.S. 570, 574, 72 Sup. Ct. 492, 494, 96 L.Ed. 576 (1952), the court will "stay its hand until the agency has applied its expertise to the salient questions." *Hansen v. Norfolk & Western Ry. Co.,* 689 F.2d 707, 710 (7th Cir. 1982); *See Augspurger v. Brotherhood of Locomotive Engineers,* 510 F.2d 853 (8th Cir. 1975). Recently, in addressing a claim remarkably similar to the one before us, the Seventh Circuit wrote:
>
> > We have no idea whether the [ICC] order can properly be construed in this fashion. We therefore cannot act to enforce the . . . order so construed until we know unambiguously what rights the order accords plaintiffs and whether the order has indeed been violated. That is the sort of determination (involving an extremely complex ICC-supervised merger) classically committed to agency discretion under the doctrine of primary jurisdiction.
>
> *Zapp v. United Transportation Union,* 727 F.2d 617 (7th Cir. 1984). Precisely the same may be said of this dispute. We simply cannot say with any certainty whether the ICC orders relating to the creation of the Penn Central system were violated by the seniority scheme underlying this dispute. That ques-

> tion, from which flows the resolution of this claim, properly lies within the discretion of the ICC. Accordingly, the district court properly dismissed the claim.

Englehardt v. Consolidated Rail Corporation, 756 F.2d 1368, 1369 (2d Cir. 1985).

In the exercise of the ICC's expertise regarding labor protection, the ICC requires arbitration of employee claims for *NYD* benefits. *Cosby v. ICC,* 741 F.2d 1077 (8th Cir. 1984), *cert. denied,* 471 U.S. 1110 (1985), *on remand sub nom. Burlington Northern Inc. - Control and Merger - St. Louis - San Francisco Ry. Co.,* Finance Docket No. 28583 (March 28, 1985), *on appeal sub nom. Cosby v. Burlington Northern Inc.,* 793 F.2d 210 (8th Cir. 1986); *Walsh v. U.S.,* 723 F.2d 570, 574 (7th Cir. 1983); *Bell v. Western Maryland Railroad Co.,* 366 ICC 64, 68 (1982); *See Bhd. of Locomotive Engineers v. ICC,* 808 F.2d 1576 (D.C. Cir. 1987) (N & W conditions).[2] Accordingly, all circuit courts of appeal which have considered the issue have held that claims for labor protection benefits are not cognizable in the district courts but must be pursued through the mandatory arbitration which the ICC in the exercise of its expertise has established as the sole means to resolve labor protection claims. *Hoffman v. Missouri Pacific*

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2. If the claimant proceeds directly to arbitration under the terms of the conditions, the ICC will review a party's objections to the arbitration award. *Chicago and North Western Transportation Company - Abandonment - Near Dubuque and Oelwein, IA,* ..... ICC 2d ....., Docket No. AB-1 (Sub-No. 83) (1987). An arbitration award regarding labor protective conditions might sometimes be viewed as a final order of the ICC under 28 U.S.C. §2321(a) which, therefore, can be reviewed only by appeals to a court of appeals. *United Transportation Union v. Norfolk and Western Ry. Co.,* ..... F.2d ....., Case No. 86-5003 (D.C. Cir. 1987). In this case, plaintiffs made no effort to proceed through the ICC or ICC arbitration and made no appeal from the arbitration award denying their claims.

Railroad Company, 806 F.2d 800, 801 (8th Cir. 1986) ("we hold arbitration is mandatory under Section 11 of the *New York Dock* conditions" regarding Hoffman's claim that she was a "dismissed employee" under *NYD*); *Walsh v. United States,* 723 F.2d 570, 572, 575 (7th Cir. 1983) (affirming ICC's decision that issue of causation for termination of Walsh's employment which determined his eligibility for benefits must be resolved in *NYD* arbitration). Contrary to Petitioners' representation that the "lower courts are hopelessly confused" (Pet. 11), the lower courts have consistently refused to decide *NYD* disputes on the merits and, instead, have required that disputes concerning employee eligibility under the conditions be submitted to arbitration mandated by the ICC in its labor protection order. *Atkinson v. Union Pacific Railroad Company,* 628 F. Supp. 1117 (D. Ks. 1985); *Bond v. Union Pacific Railroad Company,* 601 F. Supp. 329 (D. Neb. 1984); *McKeon v. Toledo, Peoria & Western Railroad Company,* 595 F. Supp. 766 (C.D. Ill. 1984); *Swartz v. Norfolk & Western Railway Co.,* 589 F. Supp. 743 (E.D. Mo. 1984). In sum, no court has held that it should interpret *NYD;* the courts have uniformly held that *NYD* issues are within the ICC's primary jurisdiction and should be resolved in arbitration as directed by the ICC.

Petitioners argue that the Sixth Circuit's decision in *Nemitz v. Norfolk and Western Ry. Company,* 436 F.2d 841 (1971) and this Court's decision in *Nemitz,* 404 U.S. 37, *reh. den.,* 404 U.S. 1026 (1972), are contrary to the Eighth Circuit's decision in this case and justify the issuance of a Writ. However, in *Nemitz* this Court did not address the issue of primary jurisdiction over *NYD* claims and the Sixth Circuit has expressly rejected Petitioners' argument that its *Nemitz* decision is controlling regarding *NYD* claims such as Petitioners'. *Atkins v. Louisville*

and Nashville Railroad Company, 819 F.2d 644 (6th Cir. 1987).

In *Atkins,* an employee claimed that he was entitled to *NYD* benefits because he was dismissed or displaced as defined in *NYD.* The carrier contended that Atkins was not entitled to *NYD* benefits because his job was eliminated solely as a result of a decline in business—the exact dispute between BRAC and SJTR at the time of the negotiations in this case. The trial court dismissed Atkins' claim for lack of federal court jurisdiction because of Atkins' failure to submit his claim to arbitration as required by the ICC *NYD* order. The Sixth Circuit affirmed. The Sixth Circuit correctly held that its decision in *Nemitz* and this Court's decision in *Nemitz* did not require a different result because:

(a) the Supreme Court's *Nemitz* opinion did not reach or address the issue of mandatory arbitration under *NYD;*

(b) *Nemitz* did not involve *NYD;* and

(c) the Sixth Circuit's opinion in *Nemitz* was rendered without the benefit of the ICC's interpretation that arbitration regarding protective condition claims is mandatory.

Thus, in *Atkins,* the Sixth Circuit—the only court of appeals upon which Petitioners rely to argue that a conflict among the circuits exists—has expressly rejected the argument advanced by Petitioners that *Nemitz* creates a conflict of authority regarding the primary jurisdiction issue.[3]

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3. The Sixth Circuit's *Atkins* opinion, which is consistent with the Eighth Circuit's opinion in this case and which rejects the application of the Sixth Circuit's earlier *Nemitz* decision, also establishes the irrelevancy of the Sixth Circuit's earlier decisions

(Continued on following page)

Moreover, even if this Court's *Nemitz* opinion were somehow construed to be relevant to this dispute, nothing in the Eighth Circuit's opinion in this case conflicts with this Court's *Nemitz* opinion. *Nemitz* does not hold that a negotiated agreement regarding protective benefits is invalid; *Nemitz* only precludes an agreement resulting in abrogation of protected rights. *Norfolk and Western Ry. Company v. Nemitz, supra,* 404 U.S. at 44-45.

Petitioners only identify one alleged *NYD* benefit which they claim to have been denied: the alleged right not to work and to be paid for six years after having refused an offer of continuing employment at the previous rate of pay. (Pet. 5) The Eighth Circuit held that

> both the I.C.C. and arbitrators have been ruling that an employee who rejects relocation is not a dismissed employee, and does not enjoy *New York Dock* rights.

(Pet. 17a; citations omitted) Petitioners cite no authority interpreting *NYD* to provide for pay to people who are offered railroad jobs but who refuse the opportunity to work. Petitioners have failed to identify any *NYD* benefit abrogated by the BRAC-SJTR negotiated agreement under which they elected to accept benefits and to release the railroads. In fact, considering the application of *NYD* to SJTR employees, the arbitrator ruled that the employees had received all that they could have received under *NYD*.

The Petition should be denied because the Eighth Circuit correctly invoked the doctrine of primary jurisdic-

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Footnote continued—

in *Modin v. New York Central Co.*, 650 F.2d 829 (6th Cir. 1981) and *Bundy v. Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972), which are not even mentioned in *Atkins. Swacker v. Southern Railway Company*, 360 F.2d 420 (4th Cir. 1966), did not involve *NYD* and did not address the issues of primary jurisdiction and mandatory arbitrations.

tion and there is no conflict between the decisions of this Court or of the other circuit courts of appeal with respect to the decision of the Eighth Circuit that Petitioners' claims regarding *NYD* benefits are subject to the ICC's primary jurisdiction and procedures.

B.

There Is No Authority Conflicting With the Eighth Circuit's Correct Holding That the ICC Has Primary Jurisdiction Over Petitioners' Claim Regarding the Alleged "Abandonment" of "Railroad Lines"

Petitioners argue that there is a conflict among the circuits regarding the Eighth Circuit's holding that the issue of "whether a railroad's abandonment of trackage or service without prior ICC approval violates the Act" (Pet. 14) is within the scope of the ICC's primary jurisdiction. As the District Court noted, Petitioners contend that the ICC "would have imposed the *NYD* protective conditions prior to approving the proposed shutdown of Terminal" in abandonment procedings.[4] (Pet. 11a)

The Petition cites no case in which a federal court imposed labor protection benefits because of the carrier's failure to obtain ICC authority to abandon a railroad line, as Petitioners requested the lower courts to do. Under 49 U.S.C. §10903 the ICC has exclusive jurisdiction with regard to abandonment issues. In *Chicago & Northwestern Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311 (1981), this Court reviewed the scope of the ICC's authority regarding abandonment issues in connection with a claim that the ICC's abandonment authority

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4. The cessation of SJTR yard operations using switch track was not an "abandonment" because switch track is expressly exempt from the requirement that the ICC approve an abandonment of railroad line. 49 U.S.C. §10907.

preempted state law claims. (*Id.* at 319) Observing that this Court had previously held that the authority of the ICC to regulate abandonments is "exclusive" and "plenary" (*Id.* at 320), this Court observed:

> The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the Congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. . . .
>
> The breadth of the Commission's statutory discretion suggests a Congressional intent to limit judicial interference with the agency's work. . . .
>
> * * *
>
> In sum, the construction of the applicable federal law is straightforward and unambiguous. Congress granted to the Commission plenary authority to regulate, in the interests of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive.

Id. at 321-323. In *Mississippi Public Service Commission v. Interstate Commerce Commission,* 662 F.2d 314, 319 (5th Cir. 1981), the court emphasized that the ICC had exclusive jurisdiction over abandonments and that claims regarding abandonments must be considered, in the first instance, by the ICC:

> Neither does this Court have initial jurisdiction over a claim of unlawful abandonment. To the extent that petitioners believe that ICG has unlawfully abandoned the line, they may file a complaint with the Commission pursuant to §11701(b).

Therefore, the lower courts were correct in determining that Petitioners' claim that the SJTR "abandoned" a "line of railroad" must be determined by the ICC.

Moreover, Petitioners' request that the courts below impose labor protective conditions because of the alleged "abandonment" was beyond the scope of the courts' jurisdiction. Title 49 U.S.C. §10903(b)(2) establishes that only the ICC may impose labor protective conditions because of an abandonment. Thus, Petitioners' claims regarding the alleged abandonment were properly within the scope of the ICC's jurisdiction. Provisions such as 49 U.S.C. §11705 which permit certain actions to be brought in the district court are not impliedly repealed by the application of the primary jurisdiction doctrine. *Hansen v. Norfolk & Western Railway Company*, 689 F.2d 707, 713 (7th Cir. 1982).

The cases cited by Petitioners do not establish a conflict among the circuits or with decisions of this Court regarding the ICC's primary jurisdiction over these abandonment and labor protection issues. Three of the cited cases involved actions by the ICC to enjoin an abandonment. *ICC v. Maine Central Railroad*, 505 F.2d 590 (2nd Cir. 1974); *ICC v. Chicago, Rock Island and Pacific Railroad*, 501 F.2d 908 (8th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *ICC v. Memphis Union Station Company*, 360 F.2d 44 (6th Cir. 1966), *cert. denied sub nom. Louisville & National Railroad Company v. ICC*, 385 U.S. 830 (1967). Contrary to Petitioners' argument, these cases reflect that the sole judicial means to enforce the requirement that the ICC approve any abandonment is through an injunction action staying the abandonment until the ICC acts. *ICC v. Maine Central Railroad, supra*, 505 F.2d at 594. Most importantly, these cases do not support the Petition because the issue of primary jurisdiction is irrelevant in actions such as these cited by Petitioners which were brought by the ICC to enforce its special competence regarding abandonments. *Id.*

Illinois Commerce Commission v. United States, 779 F.2d 1270 (7th Cir. 1985), involved the review of an ICC determination and remanded the case to the ICC for further determination of the issues. *New Orleans Terminal Co. v. Spencer,* 366 F.2d 160 (5th Cir. 1966), *cert. denied,* 386 U.S. 942 (1967), requires those seeking abandonment authority to apply to the ICC for authority to abandon. Similarly, *United States v. Idaho,* 298 U.S. 105 (1936), involved a challenge to an ICC abandonment order.

Thus, in all of the cases cited by Petitioners, the ICC was a party or had issued a relevant abandonment order or was to determine the issues upon remand. All of the authorities affirm the ICC's primary role in carrying out national rail transportation policy regarding the abandonment of railroad lines. The Eighth Circuit correctly identified the issues raised by Petitioners as within the ICC's jurisdiction.

C.

The Eighth Circuit's Correct Holding That Petitioners Failed to Present a Genuine Issue of Material Fact on Their Unfair Representation Claim Is Based on Established Precedent and Does Not Present a Substantial Question.

Based upon a variety of factual allegations, Petitioners' central duty of fair representation claim is that BRAC breached its duty by failing to obtain what Petitioners alone perceive to be "*NYD* benefits"—that is, the right to refuse railroad employment and still be paid. (Pet. 16) As discussed above, this fundamental tenet of Petitioners' duty of fair representation claim is without merit. While Respondents and the courts below have identified ICC

and arbitral authority supporting the conclusion that Petitioners were not entitled under *NYD* to refuse railroad employment and still be paid, Petitioners have never cited any authority supporting their interpretation of *NYD*. Moreover, Petitioners refused to participate in the *NYD* arbitration which BRAC pursued for the SJTR employees. Hence, Petitioners' meritless argument is that the Eighth Circuit erred because it did not find a breach of the duty of fair representation where BRAC obtained benefits for Petitioners more lucrative than those available under *NYD* but did not obtain one benefit which was unavailable and for which, to this day, Petitioners have failed to cite any authority. Thus, although there were many facts involved in the Petitioners' allegations regarding the duty of fair representation, there were no facts which would have justified the denial of Respondents' motions for summary judgment. *Celotex Corporation v. Catrett*, 106 Sup. Ct. 2548 (1986).

The Eighth Circuit, relying on the "well-reasoned" opinion of the District Court, held that Petitioners failed to present a genuine issue of material fact on their claim that BRAC had breached its duty of fair representation. (Pet. App. 4a-5a) As Petitioners concede (Pet. 16) the lower courts applied the correct legal standards to the facts adduced to support the claim. By itself, Petitioners' concession that no legal issues are involved in their Petition regarding the fair representation claim justifies denial of the Petition. Sup. Ct. R. 17. This Court is not a Court "for correction of errors in fact finding" and "cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 107 Sup. Ct. 2617 (1987), quoting from *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Petitioners' first factual contention is that BRAC's negotiation of something other than *NYD* benefits was in bad faith or was otherwise arbitrary or unreasonable. (Pet. 16-17) There was no deprivation of Petitioners' statutory rights because *NYD* does not provide what Petitioners claimed: pay to employees who refused to work. Nonetheless, this Court has held that:

> [a]ny authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in light of all relevant considerations, they believe will best serve the interests of the parties represented.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). The Court ruled that:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit is represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. at 338. Accordingly, the District Court correctly held that, because Petitioners' entitlement to what they claim are *NYD* protections was—and is—"hotly contested as a matter of law," Petitioners failed to raise a genuine issue of material fact in support of their contention that BRAC's decision to agree to something other than *NYD* conditions was a breach of its duty of fair representation. (Pet. App. 16a)

Petitioners next attack BRAC's "hostility" to their "small lodge" and its alleged bad faith refusal to seek Petitioners' seniority transfer to another Union Pacific facility. (Pet. 17-18) Allegations of isolated hostility by a union do not establish a breach of its fair representation duty. *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295 (1st Cir. 1985). This Court has emphasized

> We are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.

Humphrey v. Moore, 375 U.S. 335, 349, *reh. den.*, 376 U.S. 937 (1964). BRAC's rules prohibited seniority dovetailing unless an appreciable amount of work was transferred to another unit. In any event, the courts below properly found that this allegation failed to support an unfair representation claim. *See Humphrey v. Moore*, 375 U.S. at 349-50; *Ford Motor Co. v. Huffman*, 345 U.S. at 338. "A contrary ruling", the District Court reasoned, "would mean that a group of unhappy employees could present a submissible case whenever a union made an adverse determination regarding their rights vis-a-vis another union faction." (Pet. App. 25a-26a)

Petitioners also point to BRAC's alleged failure to investigate charges that work was being surreptitiously transferred from their facility. (Pet. 19) The courts below found that this allegation was unsupported. (Pet. App. 21a) BRAC reviewed all information which Petitioners provided to it and, fruitlessly, requested more from Peti-

tioners. However, even a failure to investigate in these circumstances would not have breached BRAC's duty. *Cf. Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976) (mere error in judgment not a breach of duty of fair representation).

Petitioners next cite BRAC's change of bargaining position regarding *NYD* protections and allege that BRAC misled them. (Pet. 19-20) BRAC's "change in bargaining position" was an exercise of its "wide range of reasonableness" (*Ford Motor, supra*) and led to a lucrative agreement benefiting Petitioners. BRAC did not misinform or mislead Petitioners. Petitioners' view of *NYD* is wrong. Neither BRAC, nor the District Court, nor the Eighth Circuit, nor the arbitrator—all of whom have told Petitioners that their interpretation of *NYD* is wrong—have misled Petitioners.

A final contention offered in support of Petitioners' request for review is that BRAC breached its duty by declining to permit local members to observe negotiations with the railroads. (Pet. 19) The fact is that the local chairman, one of Petitioners' co-employees, did observe the negotiations at BRAC's invitation and expense. Petitioners cite no authority to support their argument that BRAC breached its duty, as indeed there is none. The District Court correctly held (Pet. App. 19a) that "[a]llowing any requesting member to attend negotiations would obviously be a source of inconvenience and could potentially undermine the union's role of exclusive bargaining agent."

In conclusion, Petitioners have failed to demonstrate that BRAC's conduct prejudiced them to any extent and have not cited any relevant authority supporting their claim that BRAC breached its duty of fair representation.

Petitioners' request for review of the court of appeals' holding that they failed to present a genuine issue of material fact on their unfair representation claim is totally without merit and should be denied.

IV. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Relevant Statutory Authority

49 U.S.C. §11341(a):

§11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter [combinations] is exclusive . . . .

49 U.S.C. §11347:

§11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding the subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed

for a lesser period of time by the carrier before the action became effective, for that lesser period).

49 U.S.C. §10903:

§10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or

discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 405(b) of the Rail Passenger Service Act (45 U.S.C. 565(b)).

49 U.S.C. §10907:

§10907. EXCEPTIONS

(a) Notwithstanding sections 10901 and 10902 and subchapter III of chapter 113 of this title, and without the approval of the Interstate Commerce Commission, a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(b) The Commission does not have authority under sections 10901-10906 of this title over—

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

APPENDIX B

Parent and Affiliates of the Union Pacific Railroad Company

Union Pacific Corporation
Missouri Pacific Railroad Company
The Western Pacific Railroad Company
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining, Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company

Galveston, Houston and Henderson Railway Company
Houston Belt & Terminal Railway Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Pueblo Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company
Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Calnev Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company

Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company
Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.
Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company

The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.
Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company

APPENDIX C

Parent and Affiliates of The Atchison, Topeka and Santa Fe Railway Company

Santa Fe Southern Pacific Corporation
Santa Fe Industries, Inc.
The Southern Pacific and Santa Fe Railway Company
SFSP Fiber Optics, Inc.
Advertising Direction Inc.
The Atchison, Topeka and Santa Fe Railway Company
Alameda Belt Line
Central California Traction Company
The Clinton and Oklahoma Western Railroad Company
The Dodge City and Cimarron Valley Railway Company
Fresno Interurban Railway Company
The Garden City, Gulf and Northern Railway Company
The Gulf and Inter-State Railway Company of Texas
Haystack Mountain Development Company
The Kansas Southwestern Railway Company
Los Angeles Junction Railway Company
The Oakland Terminal Railway
Oklahoma City Junction Railway Company
Rio Grande, El Paso and Santa Fe Railroad Company
St. Joseph Terminal Railroad Company
Santa Fe Forwarding Company
Santa Fe Industrial Realty Company
Santa Fe Rail Equipment Company
Santa Fe Terminal Services, Inc.
Santa Fe Transportation Company
Star Lake Railroad Company
Sunset Railway Company
Transit Ice Company
Joliet Union Depot Co.

Kansas City Terminal Railway Co.
Keokuk Union Depot Co.
Texas City Terminal Railway Co.
Trailer Train Co.
Wichita Union Terminal Railway Co.
Santa Fe Energy Company
- SFELP, Inc.
- SF Energy Company of Colombia
- SF Energy Company of Indonesia
- SF Energy Company of Indonesia (Bunyu Block)
- SF Energy Company of Indonesia (Java Basin A)
- SF Energy Company of Indonesia (Java Basin B)
- Santa Fe Energy Company of Tunisia

Santa Fe Energy Products Company
Santa Fe Oil Company
Santa Fe Pacific Exploration Company
Santa Fe Pacific Fuels Company
Santa Fe Pacific Railroad Company
Santa Fe Pacific Pipelines, Inc.
Gulf Central Pipeline Company
Gulf Central Storage and Terminal Company
Gulf Central Storage and Terminal Company of Nebraska
San Diego Pipeline Company
Santa Fe Marketing Company
Santa Fe Pipeline Company
Southwest Pipe Line Company
Standard Office Building Corporation
The Zia Company
SGSI Corporation
Los Alamos Constructors, Inc.
Southern Pacific Company
Bankers Leasing and Financial Corporation
Bankers Leasing Corporation
- BLC Corporation
- Commetro Leasing, Inc.

Commonwealth Control, Inc.
The Commonwealth Plan, Inc.
The Commonwealth System, Inc.
Financial Leasing Corporation
The Pacific Plan, Inc.
The Worcester Plan, Inc.
BLFC Securities Corporation
ComPlan, Inc.
Bravo Oil Company
Constellation 130, Inc.
Constellation Reinsurance Company
Constellation Reinsco, Inc.
CRM Associates, Inc.
One Market Street Properties, Inc.
Pacific Petroleum Pipe Lines, Inc.
San Diego Pipeline Company
Santa Fe Pacific Realty Corporation
Santa Fe Pacific Timber Company
SoPac Finance N.V.
Southern Pacific Development Company
Golden Empire Investment Corporation
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Geoproducts Corporation
SFP Minerals Corporation
Southern Pacific Pipe Lines, Inc.
Black Mesa Pipeline, Inc.
Mescalero Pipeline, Inc.
SPPLITT, Ltd.
Southern Pacific Transportation Company
Central California Traction Company
Evergreen Leasing Corporation
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
The Ogden Union Railway and Depot Company

Pacific Fruit Express Company
Pacific Motor Transport Company
Pacific Motor Trucking Company
    PMT of the Southwest, Inc.
Portland Terminal Railroad Company
Portland Traction Company
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
    Southern Pacific Marine Transport, Inc.
Southern Pacific Warehouse Company
St. Louis Southwestern Railway Company
    The Alton & Southern Railway Company
    Arkansas & Memphis Railway Bridge and Terminal Company
    Dallas Terminal Railway and Union Depot Company
    Kansas City Terminal Railway Company
    Southern Illinois and Missouri Bridge Company
    The Southwestern Town Lot Corporation
    Terminal Railroad Association of St. Louis
Sunset Railway Company
Visalia Electric Railroad Company
Sunset Communications Company
Sunset Insurance Company
TOPS On-Line Services, Inc.